No. 18-96

In The
Supreme Court of the United States

TENNESSEE WINE AND
SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

BRIEF FOR THE MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANTHONY S. KOGUT
Counsel of Record
CURTIS R. HADLEY
WILLINGHAM & COTÉ, P.C.
333 Albert Ave., Suite 500
East Lansing, MI 48823
517-351-6200
akogut@willinghamcote.com
chadley@willinghamcote.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

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INTEREST OF *AMICUS CURIAE*[1]

The Michigan Beer and Wine Wholesalers Association ("MB&WWA") is a Michigan non-profit association of licensed Michigan beer and wine wholesalers. Its members distribute over 90% of all wine and beer sold to retailers under Michigan's three-tier distribution system.

MB&WWA is committed to working with regulators and others for responsible and effective regulation of the sale of alcoholic beverage products. MB&WWA believes state laws concerning the structure of a state's alcoholic beverage distribution system are entitled to judicial deference and that the power delegated to the States under the Twenty-first Amendment of the U.S. Constitution should be upheld.

MB&WWA has been involved, as either an intervenor or *amicus curiae*, in numerous federal and state lawsuits where state alcoholic beverage laws were challenged. MB&WWA, as an intervenor, participated in *Granholm v. Heald*, 544 U.S. 460 (2005), this Court's most recent decision on the interplay between the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3 and U.S. Const. amend. XXI. MB&WWA is participating as

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[1] Pursuant to Sup. Ct. R. 37.6 *amicus curiae* and its counsel state that no counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money for the preparation or submission of this brief. No person other than *amicus curiae* (or its members) contributed money that was intended to fund the preparation or submission of this brief. *Amicus curiae* files this brief pursuant to the blanket consents given by the parties, copies of which are on file in the Clerk's office.

an intervenor in *Lebamoff Enterprises, Inc. v. Snyder*, U.S. Dist. Ct., E.D. Mich., Docket No. 2:17-cv-10191, which is currently pending in the Sixth Circuit Court of Appeals, Docket Nos. 18-2199/2200. The decision in the instant case will shape the result in *Lebamoff* and in other pending challenges to state-based alcoholic beverage regulation.[2]

MB&WWA supports the Petitioner for reversal of the Sixth Circuit.

SUMMARY OF ARGUMENT

Courts have disagreed on how to interpret *Granholm* with respect to state laws that do not discriminate against out-of-state products or producers, but regulate the retailer and wholesaler tiers of a State's three-tier distribution system.

The Twenty-first Amendment and this Court's precedent require that rational laws regulating in-state retailers and wholesalers are free from the normal operation of the dormant Commerce Clause when those laws do not discriminate against out-of-state products or producers. The Sixth Circuit's decision

[2] The District Court in *Lebamoff* entered an order staying its decision pending the appeal and staying enforcement of the injunctive portion of its decision pending this Court's decision in the present case. Document No. 47, order entered October 11, 2018. The Sixth Circuit in *Lebamoff* entered a stipulated order holding the appeals in abeyance pending this Court's decision. Document No. 15-2, order entered November 6, 2018.

should be reversed and the owner residency law should be deemed constitutional.

However, if this Court affirms the Sixth Circuit, it should preserve three-tier distribution systems that funnel alcoholic beverages through licensed in-state wholesalers and retailers, which *Granholm* recognized were "unquestionably legitimate." In particular, this Court should explicitly affirm the Sixth Circuit's recognition that requiring *physical presence* of licensed retailers and wholesalers is an inherent part of three-tier systems and is consistent with the powers given to States by the Twenty-first Amendment, free of dormant Commerce Clause restraints that might otherwise apply were another product at issue.

ARGUMENT

Introduction and History

A.

It has long been recognized that "liquor" is "a lawlessness unto itself"[3] and that the Twenty-first

[3] *Duckworth v. Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in result):

> "The people of the United States knew that liquor is lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of bounds.'"

Amendment gives states the primary responsibility for regulating distribution of wine, beer and spirits for use within their borders.

The last eight decades have demonstrated the utility and effectiveness of state-based regulation of alcoholic beverages. Before and during National Prohibition, abuse of alcoholic beverages was an acute problem generating constant public outcry. Because of generally effective state regulation since the repeal of National Prohibition, it has been no more than a chronic problem.

Public concern with both intemperate and underage consumption is obvious and justified. This leads to efforts to control over-selling as the best way to control over-consumption. The alcoholic seller's appetite for profit was to be restricted along with the buyer's appetite for alcohol. Restriction was extended beyond drinkers and retailers up the supply chain to create a culture of control. All sellers were to be regulated. No one group was supposed to feel unfairly and disproportionately regulated unlike the experience of some during National Prohibition. No one engaged in selling of alcoholic beverages was to be burdened so onerously that they were pressed to disobey the law.

State enforcement powers are needed to ensure accountability, curb overstimulation of sales, avoid disorderly market conditions and ensure compliance with state regulations. State laws defining who is allowed to traffic in alcoholic beverages should not be lightly set aside. Otherwise, there is great danger that the

balance struck by a State's legislature – furthering temperance by restricting selling while not endangering temperance by over-restricting and thereby inciting illicit and unregulated sales – will be severely compromised.

B.

In 1913, Congress exercised its power under the Commerce Clause to enact the Webb-Kenyon Act which forbids the "shipment or transportation . . . of any . . . intoxicating liquor of any kind from one State . . . into any other State . . . which said . . . liquor is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." Act of Mar. 1, 1913, ch. 90, 37 Stat. 699 (codified at 27 U.S.C. § 122). In 1933, at the end of National Prohibition, Section 2 of the Twenty-first Amendment made this federal protection of State power permanent by placing it into the Constitution. Section 2 prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." In 1935, to show it recognized the States' power, Congress re-enacted Webb-Kenyon. Act of Aug. 27, 1935, ch. 740 § 202(b), 49 Stat. 877.

From the repeal of National Prohibition through *Granholm*, this Court's decisions have confirmed the power granted by the Twenty-first Amendment to the States over how to structure their alcoholic beverages distribution systems. See, e.g., *California Retail Liquor*

Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system.").

The primacy of state regulation continues to be recognized and confirmed by Acts of Congress. In 2000, Congress enacted the "Twenty-first Amendment Enforcement Act," 27 U.S.C. § 122a(b), giving state Attorneys General the ability to avail themselves of federal court jurisdiction and injunctive relief to enforce state laws dealing with alcohol. In 2006, Congress passed the "Sober Truth on Preventing Underage Drinking Act," 42 U.S.C. § 290bb-25b. In that Act, Congress recognized that "alcohol is a unique product and should be regulated differently than other products" and that "states have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts." 42 U.S.C. at § 290bb-25b(b)(7).

C.

With the repeal of National Prohibition, states were faced with the daunting task of establishing alcoholic beverage distribution systems. Of great influence in that effort was the study reported in *Toward Liquor*

Control[4], which explored and made recommendations about different forms of regulation.

For states deciding to use a licensing system to regulate the distribution of alcoholic beverages, *Toward Liquor Control* recommended[5] adoption of various practices including: a single state licensing board, tenured administrators, prohibitions against "tied house" arrangements which have "all the vices of absentee ownership" where the "manufacturers knew nothing and cared nothing about the community,"[6] restrictions on the number of retail outlets, a classification system for licenses which recognizes "the inherent differences between beer, wine and spirits,"[7] restrictions on hours of sale, licensing of both persons *and* premises, prohibitions on sales practices that would encourage consumption, limitations on advertising, and efforts to control profits and prices.[8]

Many states adopted their own versions of these recommendations to form the various parts of their three-tier distribution systems requiring alcoholic

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[4] *Toward Liquor Control*, Fosdick and Scott, 1933 by Harper & Brothers, 1960 by Raymond B. Fosdick, 2011 by The Center for Alcohol Policy.

[5] *Id.* at 28.

[6] *Id.* at 29. A residency requirement simply reflects a Legislature's determination that out-of-state owners, whether or not they be alcoholic beverage manufacturers, have all the vices of out-of-state absentee owners.

[7] *Id.* at 30.

[8] *Id.* at 28 to 34.

beverages to pass through licensed in-state wholesalers and in-state retailers who can be effectively regulated.

What is inherent in a three-tier distribution system is not limited only to those elements that exist in *every* three-tier system (i.e., the lowest possible common denominator). Nor are inherent aspects of three-tier systems limited to only those things that existed when a three-tier system was first devised, because the purpose of state-based regulation of alcoholic beverages is to allow each State the ability to find the right regulatory "fit" for its population and circumstances and to learn from its regulatory experiences.

Analysis

I. The dormant Commerce Clause review required by *Granholm* applies to laws that favor in-state products or producers.

A.

Granholm struck down exceptions to three-tier systems in New York and Michigan that, in effect, allowed in-state wineries to by-pass the three-tier distribution systems while requiring out-of-state wineries to comply with them. In the briefing, Michigan and New York expressed concern that striking down the statutory exceptions would undercut the States' Twenty-first Amendment authority to regulate in-state distribution of alcohol, a concern echoed by 36 other states in their *amici curiae* brief in support of Michigan's petition: "The possibility that federal courts may eviscerate

the States' ability to maintain their liquor control systems, as some Circuit Courts have already done, is of paramount concern to all States."[9]

This Court responded to the States' concerns:

> "The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. 'The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' *Midcal*, *supra*, at 110, 100 S.Ct. 937. * * * States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is 'unquestionably legitimate.' *North Dakota v. United States*, 495 U.S., at 432, 110 S.Ct. 1986. See also *id.*, at 447, 110 S.Ct. 1986 (SCALIA, J., concurring in judgment) ('The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler'). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."

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[9] Brief of Ohio and 35 Other States as *Amici Curiae* in Support of Petitioner, 2004 WL 530965 (2004), p. 4.

B.

Despite the above-quoted passage, lower courts continue to express uncertainty as to the tension between the dormant Commerce Clause and the Twenty-first Amendment even where a challenged law does not discriminate against out-of-state products or producers.[10] Some Circuit Courts (and also District Courts) are still reaching decisions that threaten effective state alcoholic beverage regulation, including the need for physical presence[11] or the use of residency as an element of physical presence, so long as the residency requirement is reasonable.

The nondiscrimination review adopted in *Granholm* applies only to statutes that favor in-state products or producers and not to state laws governing the in-state distribution of alcohol through licensed

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[10] As noted in Judge Calabresi's concurring opinion in *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009):

> "[T]he jurisprudence the Supreme Court has created through this updating [of the meaning of the Twenty-first Amendment] presents other problems. Regrettably, it often leaves lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from the High Court's Twenty-First Amendment decisions."

[11] The insistence on physical presence for effective enforcement has been upheld even at the supplier level. See *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972), which upheld a physical presence requirement on manufacturers in circumstances in which, unlike those in *Granholm*, there was no discriminatory exemption from three-tier requirements for any in-state suppliers.

wholesalers and retailers. This view of *Granholm* was articulated in, for example, *Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), upholding a Missouri residency requirement for wholesalers:

> "Given *Granholm*'s recency and specificity, we think the Court's discussion there provides the best guidance. The three-tier system is 'unquestionably legitimate,' *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), and that system includes the 'licensed in-state wholesaler.' *Id.* (quoting *North Dakota*, 495 U.S. at 447, 110 S.Ct. 1986 (Scalia, J., concurring in the judgment)). More broadly, state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and producers are 'protected under the Twenty-first Amendment.' *Id.* Viewed in context, the Court's statement must mean that such policies are 'protected' against constitutional challenges based on the Commerce Clause.
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> * * *
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> If it is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause, *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), then we think States have flexibility to define the requisite degree of 'in-state' presence to include the in-state residence of wholesalers' directors and

officers, and a super-majority of their shareholders."

MB&WWA submits, initially, the Court should rule the Twenty-first Amendment insulates from review under the dormant Commerce Clause laws that are rationally related to the State's core powers under the Twenty-first Amendment and do not favor in-state products or producers.

II. In the alternative, the Court should confirm that the Twenty-first Amendment immunizes from review under the Commerce Clause state regulations that are inherent in the three-tier system, and this includes requirements that retailers and wholesalers be physically present in the State.

A.

Subsequent to *Granholm* there has been an effort to negate judicially common state requirements that retailers and wholesalers be physically present in the state by claiming such laws violate the dormant Commerce Clause.

One of the most recent instances of that effort is *Lebamoff, supra*, in which the District Court effectively struck down Michigan's three-tier distribution system by enjoining the State from enforcing laws that would prohibit unlicensed out-of-state retailers from directly shipping wine to Michigan consumers because Michigan allows in-state retailers (operating within Michigan's three-tier system) to deliver by common carrier

to consumers in the State. Other pending cases challenging physical presence requirements for retailers include *Lebamoff Enterprises, Inc. v. Rauner*, Docket No. 16 C 8607, slip op., 2017 WL 2486084 (N.D. Ill. June 8, 2017), appeal pending, 7th Cir. Docket No. 17-2495, and *Sarasota Wine Market, LLC v. Parson*, U.S. Dist. Ct., E.D. Missouri Docket No. 4:17-cv-029792.

Those seeking to circumvent effective state regulation have cited language in *Granholm* regarding the ordinary nondiscrimination principles of the dormant Commerce Clause, in efforts to persuade lower courts to ignore the Twenty-first Amendment and allow them to operate outside of the three-tier system within which in-state retailers must operate.

B.

The Second, Fifth and Sixth Circuits have rejected that strained interpretation of *Granholm*, concluding the holding that three-tier systems are "unquestionably legitimate" necessarily forecloses Commerce Clause challenges to state laws that are an inherent part of three-tier systems, including laws requiring retailers to be physically present in the state.

In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), the plaintiffs challenged parts of New York's Alcoholic Beverage Control Law ("ABC Law"), claiming the laws violated the dormant Commerce Clause to the extent they prohibited out-of-state retailers from selling and delivering wine directly to New York consumers but allowed licensed in-state retailers to do so.

The Court found that was a challenge to the State's power to require retailers to be physically present in the State, an "integral" part of the three-tier system:

> "In reaching its holding, the *Granholm* Court noted that the challenged regulations were discriminatory exceptions to, rather than integral parts of, the underlying three-tier systems.
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> * * *
>
> Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, we need not analyze the regulation further under Commerce clause principles. The [pertinent sections of] New York's ABC Law are an integral part of New York's three-tier system. Because New York's laws evenhandedly regulate the importation and distribution of liquor within the state, we hold that they do not run afoul of the Commerce Clause. 571 F.3d 185, 191-192." (Footnote omitted.)

Similarly, in *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818 (5th Cir. 2010), the Court held disparate treatment inherent in the three-tier system is permissible under *Granholm*: "The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself. If *Granholm*'s legitimizing of the tiers is to have meaning, it must at least mean that." The Court also recognized the

"beginning premise" that "wholesalers and retailers may be required to be in the state."[12]

In the present case[13] the Sixth Circuit followed the reasoning of the Fifth Circuit in *Cooper v. Texas Alcoholic Beverage Commission*, 820 F.3d 730 (5th Cir. (2016) (*"Cooper II"*), that while durational residency is not an inherent aspect of the three-tier system immune from Commerce Clause review, physical presence is. After quoting from *Cooper II*, 820 F.3d at 743, the Court stated, 883 F.3d at 623:

> "In this language, the Fifth Circuit created an important distinction: requiring retailer- or wholesaler-alcoholic-beverages businesses to be within the state may be essential to the three-tier system, but imposing durational-residency requirements is not, particularly when those durational-residency requirements govern owners. n8
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> > n8 The dissent asserts that in-state distribution regulations are always discriminatory in some manner, and in some ways, the dissent is correct that '[w]hat matters is what type of discrimination is *permissible*.' [883 F.3d at 634.] However, the Fifth Circuit acknowledged this dilemma, and it rectified the issue—requiring wholesalers and retailers to be in the state is permissible, but requiring owners

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[12] 612 F.3d 809, 821.

[13] *Byrd v. Tennessee Wine and Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018).

> to reside within the state for a certain period is not. *Cooper II*, 820 F.3d at 743. * * * "

It is especially important that States have the ability to require the physical presence of retailers, because alcoholic beverage retailers (unlike producers, importers and wholesalers) are not required to hold any federal permit in order to operate. Rather, retailers are regulated by the States.[14]

The holdings in these Court of Appeals cases are consistent with *Granholm*. They are also consistent with *North Dakota v. United States*, 495 U.S. 423 (1990) (Plurality opinion of Justice Stevens):

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[14] There is no *federal* permit available to, or required of, alcoholic beverage retailers. Rather, retailers are licensed and regulated by the individual states, under each state's own laws which reflect local needs, local history, and local views on how beer, wine or spirits should be distributed and sold. There is no federal retailer permit which can be revoked or suspended if a retailer fails to comply with state law. In contrast, wineries and wine wholesalers (who form the other tiers of the three-tier wine distribution system) are required to have a federal permit and to comply with federal and state laws. See Federal Alcohol Administration Act of 1935, 27 U.S.C. § 201 *et seq.* ("FAA Act"). See also Bureau of Alcohol, Tobacco and Firearms, ATF Ruling 2000-1 (which can be found at https://www.ttb.gov/rulings/2000-1.htm) which explains that "[r]etailers are not required to obtain basic permits under the FAA Act," and "while the ATF is vested with authority to regulate interstate commerce in alcoholic beverages pursuant to the FAA Act, the extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."). The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), the successor agency to ATF, confirms that ATF Ruling 2000-1 "remains in effect and reflects the policy of TTB today." See http://www.ttb.gov/publications/direct_shipping.shtml.

> "The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate. (Citations omitted.)
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> * * *
>
> Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly."

Requiring physical presence of licensed retailers and wholesalers assures meaningful enforcement of regulations designed to protect the public, promote temperance and foster orderly markets. Physical presence allows state officials to inspect premises of wholesalers and retailers to ensure compliance, to cross-check records of wholesaler and retailer licensees, to ensure that only products registered with the State are being sold to consumers, and to otherwise aid enforcement, including through sting operations.

Michigan's three-tier system has been the focus of federal litigation, including in *Granholm* and *Lebamoff*, and Michigan's laws are typical of those found in other states.[15] Therefore, some of the pertinent laws

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[15] See discussion of the study reported in *Toward Liquor Control*, *supra*, pp. 5-6.

and regulations demonstrating that physical presence of licensed wholesalers and retailers is a required and an inherent part of the three-tier system are set out in the accompanying footnote.[16] Many of these

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[16] The three-tier system has strong "anti-tied house" provisions to prevent integration among the three tiers and to ensure that manufacturers and wholesalers do not dominate or hold any impermissible financial interests in a retailer. Mich. Comp. L. §§ 436.1603 and 436.1605.

Retail licensees are prohibited from selling or furnishing wine or other alcohol beverages to persons under 21 years of age, and are required to obtain evidence of age and identity prior to sale. Mich. Comp. L. §§ 436.1905 and 436.1906(6); Mich. Admin. Code, R. 436.1533(5).

A license applicant is subject to rules and restrictions related to the actions of its officers, directors, managers, agents, and employees, which are regularly checked by the state. Mich. Admin. Code, R. 436.1011. Violations of these laws and regulations can subject an applicant or a licensee to denial of an application or of renewal of a license, suspension and revocation of the liquor license. Mich. Comp. L. § 436.1903.

Retail licensees must maintain books and records and make them available for inspection by the State. Mich. Admin. Code, R. 436.1007 and R. 436.1645. This allows the State to track the distribution of alcoholic beverages to ensure compliance with laws and assure that alcoholic beverages are not "bootlegged" and being illegally diverted from the three-tier system. The State has the right to inspect the premises of licensees to make sure retailers and wholesalers are complying with the various laws and administrative rules. Mich. Comp. L. § 436.1217; Mich. Admin. Code, R. 436.1007 and R. 436.1645. Retailers are prohibited from warehousing alcohol on unlicensed premises. Mich. Comp. L. § 436.1901(1); Mich. Admin. Code, R. 436.1025. The premises of a retailer upon which an unlawful sale occurs are deemed a public nuisance and subject to abatement, which is a strong deterrent. Mich. Comp. L. § 600.3801(d). These enforcement mechanisms would not exist, as a practical matter, without physical presence.

regulations (as well as others) would be impossible to effectively enforce without physical presence of the licensee giving the State the ability to visit and inspect the premises and records, and to penalize non-compliance with meaningful sanctions including putting a transgressor completely out of business by license revocation or closing.

C.

Residency is different than physical presence.[17] One is, or is not, physically located within the borders

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Licensed wholesalers and retailers have responsibility for collecting and remitting state and local taxes and must keep extensive records, which allows the State to cross check records among the various tiers to ensure compliance. Mich. Comp. L. §§ 436.1301 and 436.1409; Mich. Admin. Code, R. 436.1007, R. 436.1641, R. 436.1725, R. 436.1727 and R. 436.1865. Licensees are required to file monthly statements indicating the total amount paid for alcoholic liquor purchased during the preceding month. Mich. Admin. Code, R. 436.1631 and R. 436.1720.

A "cash law" prohibits wholesalers from selling and retailers from buying wine on credit. Mich. Comp. L. § 436.2013. This ensures retailers are operating a viable business (and thus less likely to skirt the law). It also prevents wholesaler favoritism ("aid and assistance") through the grant of credit, which could be used to induce a retailer to only sell the products carried by the wholesaler offering credit terms (thus reducing consumer choice) and leaving the disfavored retailers less viable and possibly more likely to skirt the law.

Under the three-tier system, the enforcement activities of Michigan's Liquor Control Commission are assisted by Michigan law enforcement officers. Mich. Comp. L. § 436.1201(4).

[17] Michigan, for example, does not require its retailers, or the owners of retailer entities, to reside in the State. But Michigan does require that retailers and wholesalers of alcoholic beverages

of the state. There is no such thing as an arguably excessive physical presence requirement.

A residency requirement, including a durational one, has been judged correctly to be legitimate as an element of a state's definition of physical presence, with plausible regulatory benefits. See *Southern Wine and Spirits of America, Inc.*, *supra*. Other durational residency requirements have been rejected as excessive instances of purely protectionist intent. See *Cooper II*, *supra*, and *Byrd*, *supra*. It is hardly surprising that the Fifth Circuit in *Cooper II* did not reinstate a residency requirement that had not existed in Texas for twenty years and which the State was not requesting.

The protection of physical presence requirements for the two lower tiers by the Twenty-first Amendment is absolute, often referred to as "inherent," "integral" or "critical" to a three-tier regulatory scheme. The protection of residency requirements may be more limited and fact dependent. See *Byrd*, *supra*, opinion of Sutton, J., concurring in part and dissenting in part, 883 F.3d at 628-636.

Even assuming *arguendo* that the Courts in *Cooper II* and *Byrd* were correct that the residency laws at issue there were not immune from challenge, those Courts were wrong in stating that no type of residency law is immune. Such a broad statement was merely *dictum* and contrary to the injunction of

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have a physical presence in the State which allows effective enforcement of comprehensive regulations.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964), that: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."

CONCLUSION

State laws requiring retailers and wholesalers to be present in the state are an inherent part of the three-tier system and are valid under the Twenty-first Amendment, regardless of whether the regulations may discriminate against out-of-state retailers or wholesalers who do not participate in the three-tier system.

The Court's decision in the present case will likely have great significance with respect to the ongoing attempts to dismantle three-tier systems and, effectively, the Twenty-first Amendment.

If the Court chooses to narrow[18] Twenty-first Amendment powers to regulate owner residency of retailers, MB&WWA requests the Court to reaffirm *Granholm*'s and *North Dakota*'s recognition that States may require alcoholic beverages to pass through licensed wholesalers and retailers, and to confirm that states

[18] See Judge Calabresi's concurring opinion in *Arnold's Wines*, 571 F.3d 185, 191.

may require licensed retailers and wholesalers to be physically present in the state, free of any dormant Commerce Clause concerns.

Respectfully submitted,

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ANTHONY S. KOGUT
Counsel of Record
CURTIS R. HADLEY
WILLINGHAM & COTÉ, P.C.
333 Albert Ave., Suite 500
East Lansing, MI 48823
517-351-6200
akogut@willinghamcote.com
chadley@willinghamcote.com

Counsel for Amicus Curiae